



BellSouth Telecommunications, Inc.  
333 Commerce Street  
Suite 2101  
Nashville, TN 37201-3300

joelle.phillips@bellsouth.com

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OFFICE OF THE  
EXECUTIVE SECRETARY  
January 18, 2002

Joelle J. Phillips  
Attorney

615 214 6311  
Fax 615 214 7406

## VIA HAND DELIVERY

Mr. David Waddell, Executive Secretary  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37243

Re: *Notice of Rulemaking*  
Docket No. 01-00972

Dear Mr. Waddell:

BellSouth provides these supplemental comments concerning the proposed rules being considered by the Tennessee Regulatory Authority ("TRA") in the above-referenced docket. As noted in BellSouth's comments filed on December 14, 2001, and discussed during the rulemaking hearing on Monday, December 17, 2001, BellSouth has substantial and serious concerns regarding the proposed rules governing company to company complaints and urges that the current draft rules be withdrawn or revised to address these concerns. BellSouth reiterates its concerns, expressed in earlier oral and written comments, and supplements those comments as set out below.

BellSouth's concerns regarding the rules fall into two categories. First, BellSouth is concerned that the timetable set out for expedited relief in the rules will be impracticable in many cases, and, accordingly, will not meaningfully advance the resolution of those complaints. Second, BellSouth believes that the rules contemplating interim relief are inconsistent with the granting of interim relief under Tennessee law and incorrectly suggest that the TRA is empowered under statute to impose relief of that nature. As discussed below, BellSouth respectfully submits that the TRA is limited by its statutory grant of power, which does not include the ability to grant injunctive relief, but rather only provides the TRA with the power to seek injunctive relief in a court of appropriate jurisdiction.

**I. Expedited Treatment.**

BellSouth's concerns regarding the anticipated problems with the expedited schedule proposed in the rules were set out in BellSouth's earlier written comments and were echoed by several parties appearing at the rulemaking hearing on December 17<sup>th</sup>. As expressed in its earlier written and oral comments, BellSouth believes that the schedule imposed for complaints seeking expedited review simply will be unmanageable in the majority of cases. BellSouth proposes instead that Rule 1220-1-2-.15(1)(b) should be revised to provide that the respondent must file a response to the request for expedited treatment (and not to the substantive allegations of the complaint) within seven days and that the complaining party must request a specific expedited timetable. The complaining party should be required to cite grounds for the specific timetable sought. As discussed at the hearing, many of these carrier to carrier complaints involve complex technical issues or substantial records and documents and, in many cases, seven days is simply not feasible for the preparation of a substantive response. The seven-day response period is arbitrary and would be unreasonable in many, if not most, cases. By eliminating the seven-day period for a substantive response and replacing it instead with a seven-day period to respond solely to the request for expedited treatment, the TRA could determine whether expedited treatment in a particular case is warranted and, if so, tailor the period for such expedited treatment based on the specific allegations in the complaint.

BellSouth is also concerned that the rules for expedited treatment of complaints do not reference discovery or prefiled testimony in advance of hearing on these disputes. While it is true that some carrier to carrier complaints occur after a period of negotiation and discussion between those companies, there is no requirement that the companies have exchanged information prior to the filing of the complaint. Without discovery, the defending party lacks a meaningful opportunity to defend against the allegations triggering due process concerns. As discussed at the rulemaking hearing, the lack of pre-hearing discovery and prefiled testimony can result in a less organized, effective presentation of evidence at hearing, which in turn, reduces the likelihood of expedited, appropriate resolution of the complaint.

## II. Interim Relief.

During the rulemaking hearing, several comments were made regarding the standards alluded to in the proposed rules for the granting of interim relief by the TRA. While BellSouth agrees as a general matter that the TRA's rules should not suggest a departure from Tennessee law with respect to interim relief, upon further study after the hearing, BellSouth is also concerned that the rules suggest that the TRA is empowered to provide injunctive relief notwithstanding the lack of statutory authority for that position. Section 65-4-105 of the Tennessee Code provides that the TRA has "with reference to all public utilities within its jurisdiction all the other powers conferred with reference to railroads regulated by the department of transportation . . . as provided by chapters 3 and 5 of this title." Section 65-3-105, in turn, requires the department of transportation to "see that such companies shall comply with all such regulations and orders as it may reasonably and lawfully make" and to enforce such regulations and orders "by mandamus or mandatory injunction, or by other summary proceedings provided by law." Significantly, the statute then plainly states that "[i]t is made the duty of the courts having jurisdiction in such proceedings to hear and determine all such summary causes as speedily as practicable . . . ." *Id.* (emphasis added). Clearly, section 65-3-105 permits the TRA to request a court to issue an injunction, but it does not permit the TRA to issue an injunction on its own.

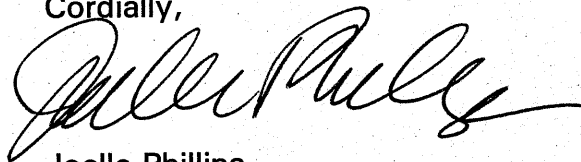
Moreover, even if the TRA were empowered to issue injunctions, under Tennessee law, an injunction is an extraordinary and drastic remedy that is never appropriate merely as a matter of right. *Wright & Miller* § 2948; *Butts v. City of South Fulton*, 565 S.W.2d 879, 882 (Tenn. Ct. App. 1977); *Hall v. Ballance*, 497 S.W.2d 409, 410 (Tenn. 1973); *Morrison v. Jones*, 430 S.W.2d 668, 673 (Tenn. Ct. App. 1968); *Hall v. Britton*, 292 S.W.2d 524, 531 (Tenn. Ct. App. 1953). Instead, the party requesting an injunction bears the burden of proving that it is entitled to an injunction and in considering such a request, the TRA must consider the following factors: (1) the likelihood of the complaining party's success on the merits of its claims; (2) the likelihood that the complaining party would suffer irreparable injury without an injunction; (3) the likelihood that other parties would suffer substantial harm absent an injunction; and (4) the likelihood that the public would be harmed absent an injunction. *See Doe v. Sundquist*, 106 F.3d 702-705 (6<sup>th</sup> Cir.), *cert. denied* 118 S. Ct. 51 (1997). The TRA cannot confer upon itself through a rulemaking more power than the courts to grant interim relief. Additionally, under Tennessee law, an injunction is not an appropriate remedy when the party seeking

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the injunction has an adequate alternate remedy in the form of money damages. *Fort v. Dixie Oil Co.*, 95 S.W.2d 931, 932 (Tenn. 1936). For example, Tennessee courts have held that an award of money damages is an adequate remedy for any breach of contract. See *Williamson County Broadcasting Co. v. Intermedia Partners*, 987 S.W.2d 550, 554 (Tenn. Ct. App. 1998) (holding that money damages was an adequate remedy for alleged breach of contract because "[a]fter all, this whole dispute is about money, and damages for the breach of a personal contract is generally an adequate remedy."). Accordingly, even assuming the TRA had the power to award injunctive relief, such relief would not be proper in any case involving the breach of a contractual obligation.

BellSouth urges the TRA to reject or revise the proposed rules. BellSouth respectfully submits that the rules proposed for expedited treatment of specific complaints are unnecessary. Any complaining party could currently file a motion seeking to have its complaint specially set and response time shortened on a showing of good cause. That procedure would be preferable to the procedure set out in the proposed rules because it would be specific to the individual complaint and would not presume that all complaints warranting some sort of expedited treatment can be resolved under the expedited treatment timetable set forth in the rules. With respect to the rules regarding interim relief, BellSouth respectfully submits that the rules contemplate the awarding of relief beyond the statutory authority of the TRA. Moreover, even if the TRA had the power to issue injunctive relief, the issuance of such relief must comport with the Tennessee law governing injunctive relief, and any rules referencing such relief should explicitly track generally applicable Tennessee law regarding injunctive relief.

Cordially,

A handwritten signature in black ink, appearing to read "Joelle Phillips", written in a cursive style.

Joelle Phillips

JP/jej

cc: Jim Wright, Esquire  
Chuck Welch, Esquire  
Don Baltimore, Esquire  
Henry Walker, Esquire